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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 26 2009

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time she filed the petition, the petitioner was a postdoctoral researcher at the Western Institute for Food Safety and Security (WIFSS) at the University of California, Davis (UCD or UC Davis). The petitioner is now a visiting scientist at the U.S. Food and Drug Administration (FDA). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and additional exhibits.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on July 23, 2007. In a statement accompanying the initial submission, the petitioner described herself as "an internationally recognized expert on food-borne infectious disease." Describing her work further, she stated: "I try to understand **the molecular mechanism of the pathogenesis of *E. coli* O157:H7**. Another important direction of my research is to answer what we do wrong in farming and in the processing line that gives the bacteria a chance to enter our food, and what is the environmental factor to increase the virulence of this bacteria" (emphasis in original). The

petitioner stated that she described different ways by which *E. coli* can get inside lettuce leaves, where they cannot be removed by washing.

The petitioner stated that she is "the first author of 6 papers. My publications have received high recognition in journals with worldwide distribution in the field and have been published in such prestigious academic journals as the *Journal of Bacteriology*, *Applied and Environmental Microbiology*, *etc.*" The petitioner then listed the six articles. Only two of those articles had actually been published; the others were described as "submitted" or "in preparation." The petitioner's use of "etc." is, therefore, misleading, because it falsely implied that her work had already been published in journals other than the two that she named.

The petitioner submitted several witness letters, mostly from witnesses with ties to the petitioner, with her petition. [redacted] stated:

> I am the deputy director of Shandong Center of Disease Control and Prevention (CDC), where [the petitioner] had worked for ten years before she went to the US. [The petitioner] is one of the most outstanding scientists who have ever worked in Shandong CDC. . . .
>
> [The petitioner] has proven that she is a pioneer and outstanding scientist with substantial contributions in food borne infectious disease. . . . She . . . played a leading role in the rapid diagnosis method researches in Shandong CDC, some of her research has been used as standard clinical isolation and identification methods throughout entire Shandong province for many years.

[redacted] of the Ohio State University (OSU) stated:

> I have known [the petitioner] for several years. Her research discovery on the regulation of nisin immunity [at the University of Minnesota] is groundbreaking. It contributed to the understanding of the molecular mechanism involved in nisin production and protection, the best model system understood so far in bacteriocin (small molecule produced by certain bacteria that can kill other microorganisms, such as Gram-positive bacteria including pathogens in this case) production. . . . I have been trying to recruit [the petitioner] to join the OSU food safety team after she got her Ph.D., but obviously I was too late and UC Davis got her.

[redacted] of WIFSS and the petitioner's supervisor there, stated:

> I feel very fortunate to have been able to attract [the petitioner] to the Institute. Her work is extraordinarily important to the goals of the Institute and to the field of foodborne infectious disease. . . . [The petitioner] provides the core for our basic genomic research on foodborne pathogens. . . .

She has been very productive in the challenging field of identifying genetic markers for pathogen virulence. Even at this early stage in her career, her work on the virulence of the foodborne pathogen, *E. coli O157:H7*, has been praised by leaders in the field. This is extremely important work, which will lay the foundation for understanding the conditions that lead to *E. coli O157:H7* evolving (mutating) into highly lethal strains. [The petitioner's] work could very well lead to developing ways of preventing the shift to highly lethal strains by changing the environmental conditions necessary for shifts in virulence by pathogens. The underlying genetic mechanisms that she is investigating can be applied to other pathogens, which will likely provide her a long-term, highly significant research career path.

[redacted] stated:

Although she is not in my laboratory, I have become aware of the work [the petitioner] is doing in a laboratory just down the hall from my office. . . . Her genetic studies here at UCD promise to make an important contribution to preventing transmission of a highly significant scourge of the United States and various other countries, *Escherichia coli* O157:H7. . . . [The petitioner's] genetic work will contribute very significantly to reducing carriage and shedding of the agent by cattle, thus making our food and water safer.

[redacted] of the University of Cambridge, United Kingdom, stated:

I became acquainted with [the petitioner] during my sabbatical period at UC Davis. . . .

I consider her current work to be exceedingly important to the field and to be breaking new ground. Her research compares very favorably with some of the best research in the UK. It is very important that someone with her knowledge, skills and training can continue to do this work at WIFSS.

With respect to the last sentence above, the record shows that the petitioner left WIFSS in October 2008, before the denial of this petition. [redacted] stated that the petitioner "has had five first author papers in recent years in the key journals in this field." At the time [redacted] wrote his letter, in January 2007, the petitioner had published only two papers (one in 2002, one in 2006).

[redacted] at the Agricultural Research Service, stated:

Although I have not directly worked with [the petitioner], I know of her through her published work, presentations at scientific meetings, and personal communications. . . .

[The petitioner] has extensive experience in conducting research fighting foodborne infectious diseases. . . . The work by [the petitioner] has profound benefits to our national healthcare system and food industry.

The petitioner stated that her initial submission also included a letter from University of Minnesota [redacted], but the letter was missing from the initial submission.

On August 21, 2008, the director instructed the petitioner to submit evidence of "a past record of specific prior achievement that justifies projections of future benefit to the national interest." The director specifically requested evidence of independent citation of her published work, and "copies of any additional articles not previously submitted, that have been published . . . prior to the filing of the petition." In response, the petitioner submitted copies of two of her articles, both published after the petition's filing date, and the unpublished manuscript of a third article. The newly-published articles appear to be revisions of two of the manuscripts from the initial submission. This submission seems to confirm that, as of the filing date, only two of the petitioner's articles had actually been published.

With regard to citation of her work, the petitioner submitted database printouts listing 13 citations of her work, as well as copies of eleven of the citing papers. Most of the published citations appeared in 2008, after the July 2007 filing date. Only one published citation clearly appeared prior to the filing date, in a 2003 article. Another citation, from a book published in 2007, may have predated the filing of the petition; the record does not show the exact publication date. Both of these citations referred to the petitioner's work at the University of Minnesota in 2002.

The petitioner submitted five additional witness letters, including a letter from [redacted] The letter is dated January 25, 2007, indicating that this is likely the letter that the petitioner meant to include in the initial submission. [redacted] stated:

> Much of my research involves finding natural ways to control pathogens. One natural little protein that has enormous potential for controlling many dangerous pathogens is nisin and it is on this protein that [the petitioner] did her research in my laboratory.
>
> During her research on nisin production in my laboratory, [the petitioner] made many exciting discoveries that contributed enormously to the understanding of this system. . . . She has proven herself to be an excellent scientist with an ability to investigate complex issues and come up with creative solutions. . . .
>
> I consider [the petitioner] to be one of the best young scientists of today.

[redacted] of the *International Journal of Food Microbiology*, stated:

> [The petitioner] is a member of our **Editorial Board** and an **Expert Reviewer** to review original manuscripts in the subject of food and applied microbiology submitted by other scientists for publication in this journal. . . .
>
> [The petitioner] was selected as an Expert Reviewer because of her extensive experience and outstanding achievements in both scientific research and technical innovations in

> food-borne pathogen research and her broad background in molecular microbiology and public health. . . .
>
> The internalization of *E. coli* O157:H7 into lettuce reduces the decontamination efficacy of industrial washing process and allows a greater survival of pathogen in lettuce. This finding reveals one more risk factor in explaining why the California lettuce has caused 22 outbreaks from 1996-2005. [The petitioner] is the **first investigator** to reveal the existing risk of this technique. The significance of this finding is needless to say very critical for improving lettuce/other leafy-greens safety. It also gives compelling evidence that [the petitioner's] expertise has risen to the very top of the field of the endeavor.

[redacted] of Food Safety and Quality Programs at NSF Davis Fresh, stated:

> I am familiar with [the petitioner's] research work and have worked closely with her to develop scientific approaches for produce industry problems. We continue to act as joint Principal Investigators on a number of research proposals. . . . Her work is extraordinarily important to the field of foodborne infectious disease.

The final letter, from [redacted] of the FDA Center for Food Safety and Applied Nutrition, was originally written to support a separate nonimmigrant visa petition. [redacted] stated that the petitioner's "scholarly publications and participation in professional conferences have been impressive," and that the FDA intended to employ the petitioner "for a three-year period."

The director denied the petition on December 16, 2008, stating that the petitioner's publication and citation record as of the petition's filing date did not indicate significant influence or impact in her field. The director found that the petitioner's witness letters came primarily from her mentors and collaborators, and described her work "mostly in general terms."

On appeal, counsel argues that the petitioner "is an influential scientist" whose "publications have been cited a total of nine times in only a relatively short period of time." Counsel observes that, while the petitioner's "citation rate increased after the July 2007 filing, the actual cited research work took place prior to the filing date, and therefore it is appropriate to conclude that she had already undertaken and published her high-impact work before the filing date."

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

The petitioner has not shown that nine citations is a particularly significant number. More fundamentally, the flaw in counsel's argument is that, at the time the petitioner filed the petition, there

was minimal documented reaction to her work in the published literature. At the time of filing, there was not already an established pattern of heavy citation of her work. Thus, even if the petitioner had documented a significant later pattern of citation, which we do not concede here, this would not establish that she was eligible for the waiver at the time of filing. The waiver requires evidence of eligibility at the time of filing, rather than reason to believe that such evidence will eventually exist at some later time. Counsel's logic provides an incentive for petitioners to file as early as possible, and then stall the adjudication of the petition while awaiting the accumulation of further evidence.

Counsel correctly states that we can take into account "documents evidencing continuing influence . . . after the priority date." Indeed, if an alien's influence apparently ceased after the priority date, this would be grounds for concern. But counsel's argument, here, presupposes the petitioner's influence before the priority date; otherwise, her later influence would not be "continuing." The petitioner has not persuasively shown that, at the time of filing, she was already as influential as she claims.

Citations are not the only means by which to show the petitioner's impact on her field. Independent witness letters can play a significant role in this respect. Here, however, the petitioner has submitted only a handful of such letters, which collectively fail to establish the depth or extent of her influence on the field. Simply listing her achievements cannot suffice in this regard, because all graduate students and postdoctoral researchers are arguably expected to produce original work.

A recurring theme in this petition is the importance of ensuring a safe, pathogen-free food supply. The petitioner has not shown, however, that her work has resulted in any remedial action by the food industry; significant policy changes by regulatory agencies; or any other concrete steps by the government or industry. If the petitioner's work has not changed how food is processed, or the requirements relating to that processing, then it is not clear in what meaningful sense she has had the influence she claims unless we return to the realm of speculation about what changes might someday result from her work.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.